Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

No. 263

ARMOUR AND COMPANY, SWIFT AND COMPANY, THE CUDAHY PACKING COMPANY, JOHN MORRELL & COMPANY, AND WILSON & CO., INC.,
*Plaintiff-Petitioners,*

*vs.*

CHICAGO, MILWAUKEE, ST PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
*Defendant-Respondents.*

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CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
*Plaintiff-Respondents,*

*vs.*

ARMOUR AND COMPANY, SWIFT AND COMPANY, THE CUDAHY PACKING COMPANY AND SUPERIOR PACKING COMPANY,
*Defendant-Petitioners.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*vs.*

ARMOUR AND COMPANY, SWIFT AND COMPANY, THE CUDAHY PACKING COMPANY AND SUPERIOR PACKING COMPANY,
*Defendant-Petitioners.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

*To the Honorable, the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:*

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States

Commission to have been created by this rule. There are thousands of instances where violations of the long and short haul provisions of Section 4 of the Act are prevented solely by reason of rates created by this rule.

The Circuit Court holds that this rule does not create rates published in conformity with the statute at the unnamed intermediate points.** The impact of this decision upon the freight rate structure of the Nation is tremendous. If this rule does not establish lawful rates to and from unnamed intermediate points, the declared objective of the Commission, of insuring publication of rates in the manner required by the statute fails, and has failed for the past twenty-five years. Scores of carriers have for years assumed they were protected from unlawful publication of rates in thousands of instances solely on the theory that this rule *does* create rates to and from all unnamed intermediate stations.* To now suddenly strike down one of the keystones of the national freight rate structure is to produce chaos and confusion in a situation which the Congress has declared should be plain and clear.

The second question is whether a specific rate, clearly published in a rate tariff, is made null and void by mere inference drawn from the fact that the specific rate is to a point outside the general and affirmative territorial description found on the cover of the tariff. Illustrating: If the cover of the tariff merely states "This tariff names rates from points in Illinois to points in Pennsylvania," is a specific rate found in the tariff "from Chicago, Illinois

** An explanation of the specific application of this rule to the facts here, appear in Part 4, Appendix hereof, pages 25, 26.

* Specific illustrations taken from tariffs of record here, of rates which would be in violation of the long and short haul provisions of the Fourth Section of the Act, but for the application and protection of the intermediate rule appear in Part 5 of the Appendix hereto, page 27.

*and Gary, Indiana* to Philadelphia, Pennsylvania, null and void as far as its application from Gary, Indiana, is concerned. We shall show that for fifteen years the Commission has held that such a general description on the cover of a tariff does not nullify a specific rate created in the tariff by mere inference and that the cover must contain specific restrictive language making inference unnecessary before such a result occurs. The Circuit Court has also struck down this fifteen year old rule of tariff construction established by the Commission.†

**THE ERRORS ASSERTED.**

We shall show:

(a) That the action of the Circuit Court disposes of a Federal question which has not been, but should be, passed upon by this Court in view of the National importance and staggering consequences of the decision.

(b) That the action of the Circuit Court in striking down a tariff rule written by an administrative body charged with the enforcement of a Federal statute, with the declared purpose of insuring observance of the statute it was created to enforce, and applied and observed by shippers and carriers alike for twenty-five years, without mention or recognition of that long-standing and universally observed interpretation, is wholly contrary to the principle announced by this Court in *Dismuke* v. *U. S.*, 297 U. S. 167, 174, and cases there cited, to the effect that an administrative construction "of such long standing is not lightly to be overturned." The error is emphasized when it is realized that all parties to the record conceded on brief that the rule *did* create lawful rates to such unnamed points.

† The interpretation referred to and an explanation of the application of this rule to the facts here, is found in Part 6, Appendix hereto, pages 27-29.

(c) That the interpretation given this Commission-authored language by the Commission results in entire and complete legality of the tariffs construed. The construction given by the Circuit Court produces scores of instances where tariffs name rates flagrantly in violation of the statute. (See Part 5, Appendix hereto, page 27.) This is contrary to the rule of tariff construction announced by this Court in *Great Northern Railway* v. *Delmar Co.*, 283 U. S. 686, where this Court, in selecting one of two possible tariff interpretations, chose that interpretation which did not create rates which would have been in violation of law, saying:

> "This conclusion is in accord with the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in a violation of the law."

(d) That the emphasis appearing in the decision of "named" rates as distinguished from "published" or "established" rates, indicates that the Circuit Court labored under a misconception that different meanings attached to the phrases used. To this extent the decision of the Circuit Court is at variance with the decision of this Court in *United States* v. *Miller*, 233 U. S. 599, where "named," "published," "specified" and "established" rates were interpreted as synonymous:

> "Of course these expressions * * * are identical in meaning, and to ascertain that meaning recourse must be had to Section 6 of the Act."

**THE BASIS OF THE JURISDICTION OF THIS COURT TO REVIEW THE JUDGMENT IN QUESTION.**

1. The statutory provision believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 U. S. C. A., quoted in full in Part 7 of the Appendix hereto, page 29.

2. This petition was filed in this Court within the time required by paragraph (c) of Section 2101 of Title 28, U. S. C. A., also quoted in full in Part 7 of the Appendix hereto.

3. This proceeding involves the interpretation and application of a statute of the United States, viz., the Interstate Commerce Act, and particularly of Sections 6(7) of Title 49, U. S. C. A. (also quoted in full in Part 7 of the Appendix hereto), prohibiting any railroad from collecting for transportation, a greater charge than the charge named in its tariffs in effect at the time of shipment.

4. The decision believed to sustain the jurisdiction of this Court is

*Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285.

At page 290 of that decision this Court said:

> "Every question of construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of Federal Law."

Every shipment involved in each of the consolidated cases moved from an origin in one state to a destination in another and different state, and the rates applicable are found solely in tariffs naming interstate rates.

## THE QUESTIONS PRESENTED.

The following questions, although repeatedly decided by the Interstate Commerce Commission, have never been passed upon by this Court. In view of the conflict between the uniform decisions of the Commission, on the one hand, and the decision of the Circuit Court on the other hand and of the national importance of the questions presented, they should be decided by this Court.

1. Does the publication in an interstate railroad tariff of a rate from A through B to C; and the publication in

connection therewith in the same tariff of a rule providing that the rate from A to C will also apply from A to all unnamed intermediate destinations along the authorized route to C, including B, produce a rate from A to B which is a *published* and applicable rate satisfying the requirements of the Interstate Commerce Act that the carriers must publish rates from A to B.

2. When in a railroad tariff there appears in Section 1 of the tariff a rate from A through B to C, and there is published in connection with that rate a rule providing that the rate from A to C shall also apply to all intermediate unnamed destinations, including B; when in Section 2 of the same tariff there is a higher rate published from A to intermediate B than the rate in Section 1 from A through B to C; and, when the title pages of both sections of the tariff clearly provide that rates published in Section 1 of the tariff will apply no matter what rates be found in Section 2 between the same points, is the fourth section of the Act, requiring rates from A to B which are no higher than rates from A through B to more distant C, satisfied.

3. Can a rate from station A to station B clearly published in the body of a tariff be nullified by mere inference drawn from the fact that the general affirmative description of the origin territory found on the cover of the tariff is not inclusive of station A; or that the general affirmative description of the destination territory found on the cover of the tariff is not inclusive of station B, particularly where the service authorized by the tariff between the territories described in the tariff cover, cannot be performed without passing through A or B or both; considering that the statute itself requires that rates from A to the described destination territory; or to B from the origin territory shall not be higher from A than from the more distant origins described on the cover; or to B than to more distant destinations described on the cover.

## SPECIAL AND IMPORTANT REASONS FOR REVIEW OF THE DECISION.

**A National Administrative Practice, Existing for Over a Quarter of a Century, of Publishing Rates in Compliance With the Requirements of the Act, Used With Approval of the Commission, Under Published Tariff Provisions Written by the Commission, With the Stated Objective of Compliance With the Act in Mind, Should Be Struck Down by No Authority Lower Than This Court.**

Section 6(1) of the Commerce Act still requires every railroad to publish and file with the Commission its tariffs naming rates on every commodity which it holds itself out to transport, and between every two points between which it holds itself out to perform such transportation service. Section 6(7) of the Act prohibits any carrier from engaging in transportation until such tariffs are filed. As the Commission has frequently pointed out, literal compliance with these requirements, by publishing specific rates on thousands of commodities between each of thousands of stations and every other station, would present a staggering and costly task. As a result we have today and have had for decades, nationwide use by railroads, with the approval of the Commission, of various tariff "short cuts." One of the most commonly used, and one appearing in practically all tariffs filed with the Commission, is the so-called "intermediate rule."*

Every tariff of record here contains such rules. The

* There are two kinds of intermediate rules. The "origin intermediate rule" is intended to make the rate from the named origin, also from all intermediate unnamed origins, to the named destination. The "destination intermediate rule" is intended to make the rate to the named destination, also applicable to all intermediate unnamed destinations from the named origin. Only the latter rule comes into play in the instant case.

decisions of the Commission reflect the common use of such rules in tariffs, throughout the years in every section of the United States. The record here reveals that the Commission not only recognizes the validity of such rules, but has actually written the rules which the tariffs must contain, if intermediate application of rates is desired. Those intermediate rules have become an integral part of the system of tariff publication employed throughout the Nation. Countless rates are today being observed collected and paid the sole legal basis therefor being the intermediate rule.

It follows that the meaning, interpretation and legal effect of these Commission-authored intermediate rules is of national importance. While only the destination intermediate rule is directly involved here, the equally important origin intermediate rule, identical in its provisions, is necessarily involved.

Despite the long-standing and established construction of this rule by the Commission the Circuit Court finds that Section 1 of the tariff publishes a 30-cent rate from Kansas City to East Dubuque, Illinois; it finds that that rate is specifically applicable from Kansas City over the Santa Fe line to Chicago, thence over the Great Western line to East Dubuque, Illinois.** It concedes that the tariff directs, (in language written by the Commission) that this 30-cent rate shall also apply from Kansas City to every unnamed station along this route, to which no rate is published in Section 1. No station along this route is named as a destination in Section 1 except East Dubuque. Chicago is one

** The *prima facie* circuity of this route specified in the tariff results from the operation of Sec. 15 (4) of the Act, guaranteeing to a carrier its right to the longest possible haul over its own lines. See Part 8 of Appendix, page 30, for other illustrations of circuity of open routes resulting from the same cause.

of the unnamed intermediate stations. Nevertheless the Circuit Court holds:

"* * * the fact remains that there in Section 1 no published rate from Kansas City to Chicago."

This constitutes a reversal, not only of many decisions of the Commission who wrote the rule, but also of a prior decision of this Circuit Court. (See Part 3, Appendix page 23.)

The situation presented brings into prominence the wisdom of a principle of construction of administrative pronouncements and of statutes long followed by this court, with which the decision of the Circuit Court is at complete variance.

The Interstate Commerce Commission is a body created for the specific purpose of enforcing the Interstate Commerce Act. By Section 6(6) of that Act it is authorized to make rules and regulations governing the manner and form in which tariffs naming railroad rates and charges must be filed. Acting under authority of that Act the Commission long ago* issued its "Regulations * * * under authority of Section 6 of the Interstate Commerce Act, to govern the construction and filing of freight rate schedules * * *."

Incorporated in those rules are various paragraphs and sentences which the carriers are *required* to publish in their tariffs when certain conditions exist. Those rules have "the force and effect of law." (*Maryland Cas. Co.* v. *United States*, 251 U. S. 342, 349.)

Once those Commission-authored tariff provisions appear in tariffs they assume the dignity of statutes. (*Pa. R. R.* v. *Int. Coal Co.*, 230 U. S. 184, 197.) As such, when the Commission interprets and construes its own language as pub-

* The regulations now applicable are shown to have been issued in 1928. See Shippers' Ex. 1.

lished in these tariffs it is the "draftsman of the laws they are afterward called upon to interpret." (*United States* v. *Moore,* 95 U. S. 760, 763.)

For twenty-five years the Commission has consistently and repeatedly interpreted this tariff provision, written by it and published in tariffs under compulsion of its valid order. Both appellants and appellees in the Court below agreed that the intermediate rule established specific rates at unnamed intermediate stations, just as the Commission had held. These circumstances, we think, clearly bring this case within the ambit of the long-standing rule of this Court that "a construction of such long standing is not lightly to be overturned." (*Dismuke* v. *United States,* 297 U. S. 167, 173.) The long line of cases there cited establishes the antiquity of this rule of law. We think the Circuit Court's refusal to follow this long-standing rule of this Court, its refusal to mention, let alone recognize that it was construing a Commission-authored tariff rule, diametrically opposite to the construction of that rule given it by its author in its judicial pronouncements over a quarter of a century, warrants correction by this Court.

The impact of this reversal of the interpretation placed on its own language by the Commission for twenty-five years is severe. Until this Court speaks, the identical tariff rule may be construed and applied in Iowa, in the Eighth Circuit, as the Commission has always construed it. In Illinois, in the Seventh Circuit, the diametrically opposite construction of the Circuit Court must be followed. The resulting chaos and probable discrimination between shippers is self-evident.

If the interpretation of the rule by the Circuit Court becomes the law of the land, then every carrier party here, and every carrier in the United States, is in flagrant violation of the requirements of the statute; and open and flagrant violations of the Act have existed for many years.

The tariffs of record here list scores of origins and destinations from and to which the only commodity rate published is a rate produced by the intermediate rule. The Commission's decisions disclose universal use of this rule in all tariffs. The question is one of national importance to every railroad and shipper in the United States. For years, they have accepted and followed the interpretation of the administrative author of that rule, to the effect that such a rule provided as specific and certain a rate to an unnamed intermediate point as it did to the more distant named destinations; applied to this case, as specific and certain a rate from Kansas City to unnamed Chicago as the tariff named from Kansas City to East Dubuque.

No case has been brought to our attention where an administrative action has stood for a quarter of a century, universally accepted by all, universally used, and unchallenged—when that action was taken with the declared objective of gaining and insuring observance of the law which the administrator was bound to enforce, where such action was set aside by any lesser authority than this Court.

**This Court Should Review a Decision Which Construes a Railroad Tariff Rule in Such Manner as to Create Violations of the Statute, Which Violations the Rule Construed Was Designed by Its Administrative Author to Prevent, Notwithstanding That Another Construction, Given It by Its Author for Many Years, Prevented Such Violations. The Tariff Should Be Construed to Observe, Not to Violate the Statute.**

One of the other uses of the intermediate rule often referred to by the Commission has been the prevention of violations of the Fourth Section, by avoiding the existence of rates to or from unnamed intermediate points

from an "established" rate. If this is true the Circuit Court has departed from long-standing practice in the transportation industry, and a long trend of decisions of the Commission and a decision of this Court, by differentiating between a "published" rate, or a "named" rate, and an "established" rate.

We cannot be certain from the opinion what significance was given by the Court to the varying adjectives used in describing the rate. But the printed emphasis used indicates that the Court's differentiation in the two cases was based upon some assumed distinction between a "published" rate; a rate "named" in the tariffs, and an "established" rate.† This Court should dispose of the inference that the adjectives describe any rate save the one which appears in the tariffs on file. As it stands the decision of the Circuit Court appears to be in conflict with the decision of this Court in *United States* v. *Miller*, 233 U. S. 599. After pointing out that rates are described in the Act preceded by the adjectives "named," "published," "specified," "fixed," and "established' this Court said:

> "Of course these expressions * * * are identical in meaning, and to ascertain that meaning recourse must be had to Section 6 of the Act, * * *."

† Credit for the attempt to distinguish between these phrases is erroneously given appellants in the decision.

**The Reversal by the Circuit Court of a Rule of Tariff Interpretation Made by the Commission Fifteen Years Ago, Also Conflicts With the Long-Standing Principle Established by This Court That Administrative Decisions and Administrative Actions Taken in Fulfilling the Duties of the Administrative Body to Enforce the Law Committed to Its Attention, Should Not Be Set Aside Save Upon the Clearest Proof of Error Therein.**

The situation presented may be illustrated more easily than explained. Let us assume a tariff, which states affirmatively on its cover, that it names rates from stations in *Illinois* to stations in *New York*. Within the tariff we find such rates. But we also find within the tariff that the rate provided from Chicago, Illinois, also applies from *Gary, Indiana,* to New York, under the intermediate rule.

Many years ago the railroads urged upon the Commission the theory that this specific rate to New York was null and void *as far as Gary, Indiana, was concerned* because the tariff failed to state on its cover that rates from points in Illinois *and Indiana* were to be found within the tariff. The theory was urged on the basis of earlier decisions wherein it was held that ambiguities within the tariff might be resolved by reference to matter appearing on the cover of the tariff. From this it was urged that specific and unambiguous provisions within the tariff were totally nullified by the failure to affirmatively include them on the description found on the title page.

The construction given by the Commission to such cases, in 1936, and which today stands unreversed is found in Part 6 of the Appendix, page 27.

The error in the Court's conversion in this case, of general affirmative language on the tariff cover to a negative prohibition, may be evidenced by comparing the present

tariffs with one of the tariffs which the Commission was considering in the case above cited.*

There the tariff was published by the Buffalo & Susquehanna Railroad Company. The origin territory described on the cover was "stations of that carrier shown on page 6" of the tariff. A specific route over which the rate applied from those origins to destinations was provided. The decision was that a rate from one of the "stations named on Page 6" to Baltimore, Maryland, *also* applied from an unnamed intermediate station on that route *not* on the Buffalo and Susquehanna, *not* "shown on page 6" of the tariff.

The Circuit Court here holds that a far *less* specific territorial description on the title page of this tariff *does* cancel specific rates produced in the body of the tariff. The title page here did not say *"No rates named in this tariff* to Indiana points *other than Hammond* shall apply," or "This tariff names rates to but one point in Indiana, viz. Hammond." Those are "restrictive" statements. A mere affirmative statement on the cover that the tariff names rates to Hammond, can be converted into a restrictive statement only by the unwarranted inference condemned by the Commission fifteen years ago.

> "We have never held that where the provisions of the tariff were free from ambiguity the title page could be used to limit that which was clear and definite in the body of the tariff."

This was the statement of the Commission in its prior decision* of one of the cases reconsidered and reviewed in the *Armour* case cited by the Circuit Court, which was affirmed in the *Armour* case. We submit it is consonant

* The tariff provisions are described in a prior decision (203 I. C. C. 562) of one of the cases, which was under reconsideration and review in the decision cited in Part 6 of the Appendix, page 27.

* 203 I. C. C. 562 at 566.

with the requirements of the statute, that Section 6(1) requiring that carrier's tariffs should "plainly state * * * any rules or regulations which in anywise change, affect or determine any part or the aggregate of such * * * rates * * *." This tariff contained an intermediate rule which stated affirmatively that the rate from Kansas City to Hammond would also be the rate from Kansas City to Kokomo. Certainly a negative statement equally plain is required on the tariff cover before that rule can be made inapplicable. No such statement, but mere inference is relied upon by the Circuit Court.

We think the construction given by the Commission on an important question of tariff construction, which has stood for fifteen years, should be set aside only upon the most cogent proof of illegality. Here we find such a ruling set aside with no basis save a difference of opinion as to whether language on the title page was affirmative and general, or negative and specific.

The question presented has never been passed upon by the Court. Every tariff filed with the Commission has a title page. We are faced with conflicting opinions as to the legal effect of those title pages. We think the conflict between the Commission's construction of fifteen years standing, and the present construction of the Circuit Court should be resolved by this Court.

## Conclusion.

In view of the national importance of the questions presented, we respectfully pray that the court issue the writ petitioned for herein.

Respectfully submitted,

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## APPENDIX.

(All emphasis in quotations supplied.)

### PART 1.

Statements of the Commission of their objective in providing intermediate rules in railroad tariffs.

"The purposes of an intermediate rule are to permit carriers to establish rates in an economical manner at intermediate points on the route from the more distant point to destination and to insure the carrier against violations of the long-and-short haul provision of section 4 of the act without incurring the expense of publishing specific commodity rates." *Fretz-Moon Tube Co., Inc.* v. *Buffalo & S. R. Corp.*, 203 I. C. C. 562, at 565.

"Intermediate rules are permitted to save carriers the expense of publishing specific rates from or to intermediate points, and to protect them against fourth-section violations." *Armour & Co.* v. *Chicago, B. & Q. R. Co.*, 215 I. C. C. 537, at 539.

"* * * The intermediate rule was designed primarily to enable the carriers subject to section 4 of the act to comply with the long-and-short-haul clause of that section without unnecessarily encumbering their tariffs with commodity rates at points from or to which there would be no regular movement of the particular commodity." *Revere Copper & Brass, Inc.* v. *Southern S. S. Co.*, 263 I. C. C. 625, at 627.

### PART 2.

Quotation from "Regulations Issued by the Interstate Commerce Commission, Under Authority of Section 6 of the Interstate Commerce Act, to Govern the Construction and Filing of Freight Rate Schedules * * *." (Emphasis supplied.)

"Tariffs may provide for the application of class or

commodity rate from or to intermediate points by incorporating in such tariffs the appropriate one (or more) of the rules below set forth, subject to the limitations of this rule.

"Effective on and after January 10, 1930, an intermediate point rule may not be published so as to result in establishing from (or to, as the case may be) an intermediate *point*, a rate from (or to) a more distant point *unless the tariff contains specific routing instructions showing definitely* in accordance with plan (1) of rule 4 (k)* *the routes through the intermediate point over which the rates from (or to) the more distant point apply.*"

* * * * *

"Subject to the provisions of notes 1, 2, 3, and 4 below, to any point of destination to which a commodity rate on a given article from a given point of origin and via a given route is *not named* in this tariff,† which point is intermediate to a point to which a commodity rate on said article is published in this tariff† via a route through the intermediate point over which such commodity rate applies from the same point of origin, apply to such intermediate point from such point of origin and via such route the commodity rate in this tariff† on said article to the next point beyond to which a commodity rate is published herein on that article from the same point of origin via the same route." (Shippers' Ex. 1.)

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* Plan 1 of Rule 4(k) appears at page 13 of the same publication and is

"(1) By providing that the rates in the tariff apply *only via the routes specifically shown therein.*

* * *

When it is desired to follow plan (1) * * * the following notation must be shown under the heading 'Routing Instructions':

The rates herein apply only via the routes specified on pages .... (or in items ....)."

† Where, as in the case at bar, the tariff is published in sections, each section being subject to its own intermediate rule, the words "in this section" appear in lieu of the words "in this tariff."

**PART 3.**

Citations of and quotations from decisions of the Interstate Commerce Commission (and of the Circuit Court) to the effect that the publication of the intermediate rule in a tariff produces rates to unnamed intermediate points which are just as definitely and certainly published, as though such points were named in the rate item itself.

Decided in 1926:

"The provision for application from intermediate points of origin established the rates of $62.50 per car to Los Banos and $75.50 per car to Oxalis *just as positively, plainly and legally from Galt,* the *unnamed* point, as from Sacramento, the named farther distant point, and these rates were established as specific commodity rates. In other words, *these were specific commodity rates, applicable from Galt,* notwithstanding the fact that *Galt was not specifically named* in the item." (*Miller & Lux* v. *S. P. Co.,* 102 I. C. C. 137, at 139.)

Decided in 1927:

"A rate made by the application of an intermediate clause in a tariff is *as specific as if the points of origin and destination were specifically named* in connection with that rate." (*Fruen Grain Co.* v. *L. C. & S. E. Ry. Co.,* 132 I. C. C. 747, at 748.)

Decided in 1932:

"* * * An intermediate provision in a tariff establishes *specific* rates *just as positively, plainly, and legally, from unnamed intermediate points as if such points were specifically named.*" (*Evansville Cham. of Com.* v. *Atchison, T. & S. F. Ry. Co.,* 182 I. C. C. 708, at 709.)

Decided in 1936:

"* * * an intermediate provision in a tariff establishes specific rates *just as positively, plainly, and le-*

*gally* as if the rate on the commodity shipped had been specifically provided to the point of destination." (*Alabama Marble Co.* v. *Louisville & N. R. Co.*, 208 I. C. C. 591, at 593.)

Decided in 1937:

"We have frequently held that an intermediate rule in effect establishes the commodity rate from the intermediate point substantially the same *as if the intermediate point were named in the tariff.*" (*Armour & Co.* v. *Chicago B. & Q. R. Co.*, 215 I. C. C. 537, at 542.)

Decided in 1938:

"A contrary conclusion would jeopardize the integrity of all rates established under the intermediate rule, whereas rates so established are as *definitely fixed as if they were published specifically.*" (*Swift & Co.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 709, at 713.)

Decided in 1946:

"* * * It is well settled * * * that *the rule establishes from the intermediate point,* not necessarily the origin of the shipment, from which a rate is *not* named, *exactly the same kind of rate as authorized by the tariff from the named more distant point.* Unless restricted, the rule has application to a proportional rate to the same extent as it does to any local or joint flat rate. Under the intermediate rule a proportional rate retains its character and application and does not acquire any of the characteristics of a local or flat rate." (*El Rey Products Co.* v. *Alton & Southern R. Co.*, 266 I. C. C. 525, 529.)

Decided by this Circuit Court in 1930:

"It seems to us that the rate made by operation of the intermediate rule is *quite as definite and certain as the named rate between the specific points,* and the Interstate Commerce Commission seems so to have decided. *Miller & Lux* v. *S. P. Co., et al.*, 102 I. C. C. 137; *Fruen Grain Co.* v. *La Crosse & S. E. Ry. Co.*, 132 I. C. C. 747." (*Standard Oil Co.* v. *Pennsylvania R. R.*, 40 Fed. (2d) 52, 54.)

Certiorari of the above case was denied by the Supreme Court in 283 U. S. 872; 75 L. Ed. 770.

**PART 4.**

Application of the intermediate rule to Shipment No. 2.

The Courts below were in accord in their findings of the following facts:

1. The applicable rate on the shipments was the lowest combination of any two rates on any junction point between Kansas City and New York via any route. Such rate applied via all routes over which the shipment might move.†

2. That there was lawfully in effect from Kansas City, Kansas to East Dubuque, Illinois, a rate of 30 cents applicable as one of two rate factors on carload shipments of fresh meat moving from Kansas City, Kansas to New York, New York.

3. The tariff specifically provided that such 30-cent rate should apply over the line of the Atchison, Topeka and Santa Fe Railroad to Chicago, thence via the line of the Chicago Great Western to East Dubuque. (Publication of specific routes as the only routes via which rates could be applied was required by specific regulation of the Commission.) (See Footnote to Part 2 hereof, page .....)

4. The rate of 30 cents above referred to was published in Section 1 of the tariff and applied in connection with an intermediate rule found in that section.

5. The tariff provided that any rate published between the points found in Section 1 of the tariff, would apply to

† Thus a combination of a rate from Kansas City, over the Santa Fe line to Chicago, thence to New York via the New York Central, if the lowest, would also apply over the line of the Missouri Pacific to St. Louis, Mo., thence over the line of the Baltimore and Ohio to New York.

the exclusion of any rate between the same points found in Section 2. There was a rate from Kansas City named in Section 2. Section 1 of the tariff named no rates on fresh meat from Kansas City to any point along the line of the Santa Fe-Great Western roads above described, short of East Dubuque. Therefore all of such points, including Chicago, were "points of destination to which a commodity rate on" (fresh meat) "via a given route" (the Santa Fe, or Santa Fe- Great Western) "is not named in this Section" as defined in the rule.

The Circuit Court held (emphasis supplied):

> "While it is true, as the shippers point out, that Section 2 states that 'Where rates are published in Section 1, the rates named in this section on the same commodity from and to the same points, via the same route, will not apply,' and that Section 1 also provides that 'When rates are published in this section on the commodity transported from point of origin to destination, rates named in this section will apply regardless of rates between the same points published in other commodity sections,' *the fact remains that there is, in Section 1, no published rate from Kansas City to Chicago* and, consequently, nothing on which the quoted rules of priority can operate. * * *"

This interpretation of the intermediate rule is contrary to the interpretation given that rule by its author for more than twenty-five years. (See Part 3.)

## PART 5.

Illustrations of violations of the Fourth Section of the Act existing in tariffs of record here, if the effect of the intermediate rule is *not* to create rates from (or to) unnamed stations intermediate along the route over which the rate applies.

| Commodity | Tariff Section | Origin | Unnamed Intermediate Point | Destination | Rate |
|---|---|---|---|---|---|
| Fresh Meat | (Sec. 1) | Duluth, Minn. | (Carleton, Minn.) | Kansas City, Mo. | $.58 |
| | (Sec. 2) | | Carleton, Minn. to | Kansas City, Mo. | .70½ |
| Brick | (Sec. 1) | Menominee, Wis. | (Rush, Wis.) | Kansas City, Mo. | .19 |
| | (Sec. 2) | | Rush, Wis. to | Kansas City, Mo. | .37 |
| Bldg. Materials | (Sec. 1) | St. Paul, Minn. | (Mendota, Minn.) | Omaha, Nebr. | .25 |
| | (Sec. 2a) | | Mendota, Minn. to | Omaha, Nebr. | .29 |
| Drain Tile | (Sec. 1) | Collinsville, Ill. | (Casey, Ill.) | Kansas City, Mo. | .16 |
| | (Sec. 2) | | Casey, Ill. to | Kansas City, Mo. | .18 |
| Catalogues | (Sec. 1) | Chicago, Ill. | (Lemont, Ill.) | Kansas City, Mo. | .49 |
| | (Sec. 2) | | Lemont, Ill. to | Kansas City, Mo. | .63 |
| Hides | (Sec. 1) | St. Paul, Minn. | (Savage, Minn.) | Kansas City, Mo. | .33½ |
| | (Sec. 2) | | Savage, Minn. to | Kansas City, Mo. | .40 |
| Lead | (Sec. 1) | Sioux City, Ia. | (Aurora, Ill.) | Chicago, Ill. | .22 |
| | (Sec. 2) | Sioux City, Ia. to | Aurora, Ill. | | .233 |
| Paperboard | (Sec. 1) | St. Paul, Minn. | (Nichols, Minn.) | Omaha, Nebr. | .25 |
| | (Sec. 2) | | Nichols, Minn. to | Omaha, Nebr. | .27 |

## PART 6.

Announcement of the "Title Page Rule" of tariff construction by the Commission in 1936, and its application to the facts of record. (Emphasis supplied.)

> "Intermediate rules are permitted to *save carriers the expense* of publishing specific rates from or to intermediate points, and *to protect them against fourth section violations.* The rules are published voluntarily by the carriers, and they may restrict them if they deem it advisable. The restriction, however, *should be clear and not left to be inferred from the general provisions of the tariff or from the title page.* The information appearing on the title page of a tariff is

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generally designed to summarize briefly the origin and destination territory from and to which rates are provided, is almost always compiled from the index of origins and destinations *without regard to additional territory or points from or to which rates may be provided by reason of intermediate rules. Failure to describe completely* or correctly on the title page the rates that are within the tariff *does not in itself affect any rate that otherwise is found in the tariff.* We have frequently found that failure to index a point, a commodity, or an item in a tariff does not void a rate published in the tariff. A rate made by intermediate application has legal effect notwithstanding its manner of creation. *If ambiguity be found in a tariff the title page may be used to clear up, if possible, the uncertainty, but it may not be used to alter provisions which otherwise are clear.*" (*Armour & Co.* v. *C. B. & Q. R. Co.*, 215 I. C. C. 537, at 539-540.) (All emphasis supplied.)

The Courts below correctly found the following facts;

1. There was lawfully in effect during the period involved a tariff rate of 40 cents applicable to Fresh Meat from Kansas City, Kansas to Hammond, Indiana.

2. One of the routes over which this rate was permitted to apply was via the line of the Missouri Pacific Railroad to St. Louis, Missouri; thence via the line of the Illinois Terminal Line to Peoria, Illinois; thence via the line of the "Nickel Plate" (New York, Chicago & St. Louis), to Hammond.

3. That Kokomo, Indiana, was a station intermediate to Hammond via the above route.

4. That there was published in the tariff in connection with such 40-cent rate and with all rates in the same section, the intermediate rule.

5. That the section of the tariff containing this rule and this 40-cent rate, published no rates on fresh meats, naming Kokomo, Indiana, as the destination.

The Circuit Court did not deny the application of this 40-cent rate to Kokomo, on the ground that the intermediate rule did not create any rate from Kansas City to Kokomo, but denied the application on the ground that the cover description of the destination territory to which rates were said to be published in the tariff, did not include Kokomo.

When a carrier names a rate from points in one territory, *through* an undescribed territory to points in a third territory, the statutes require observance of the long and short haul provisions of that Act just as strictly within the intermediate undescribed territory *through which it is physically necessary to pass,* as it does within the territories described on the tariff cover. Therefore the intermediate rule was just as necessary to protect the carriers at intermediate Kokomo as it was to protect them at any other point within either of the territories described on the tariff cover.

**PART 7.**

The Statutes involved.

Section 1254, Title 28, U. S. C. A.:

> "*Courts of appeals; certiorari; appeal; certified questions.* Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; • • •."

Section 2102(c), Title 28, U. S. C. A.:

> "• • •
>
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may

extend the time for applying for a writ of certiorari for a period not exceeding sixty days. * * *"

Section 6(7), Title 49, U. S. C. A.:

"*Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; *nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time;* nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." (Emphasis supplied.)

## PART 8.

**Illustrations of Circuity of Routes Resulting from Railroads Retention of the Rights Guaranteed Them by Section 15 (4) of the Act, Viz., the Longest Possible Haul Via Their Own Line.**

There are twenty different lines of railroad over which a carload of freight may be moved from an origin on the Chicago, Rock Island and Pacific Railroad in St. Paul, to points in Dubuque, Iowa, on the rails of three railroads serving that station. Those routes, the junction points, the delivering carrier, and the distances via each route are set forth below.

As required by the Commission regulations (Shippers'

Ex. 1, page 13)* rates in this tariff are permitted to apply "*only* via routes" specifically described in the tariffs. Of the twenty existing and usable routes shown below the rate may apply *only* over the two emphasized and most circuitous routes, thereby protecting the originating Rock Island railroad in securing the longest possible haul, and therefore the largest share of the through rate paid. This right is guaranteed by Section 15 (4) of the Act.

| Via Rock Island Line to— | Miles |
|---|---|
| Waterloo, Iowa, thence Illinois Central..... | 296.8 |
| Cedar Falls, Iowa, thence Illinois Central..... | 297.4 |
| Albert Lea, Minn., thence Illinois Central..... | 302.4 |
| Iowa Falls, Iowa, thence Illinois Central..... | 326.9 |
| Cedar Rapids, Iowa, thence Illinois Central.... | 345.0 |
| Independence, Iowa, thence Illinois Central.... | 364.6 |
| Faribault, Minn, thence C. G. W..... | 397.2 |
| Clarksville, Iowa, thence C. G. W..... | 291.4 |
| Waterloo, Iowa, thence C. G. W..... | 303.3 |
| Hampton, Iowa, thence C. G. W..... | 312.3 |
| Reinbeck, Iowa, thence C. G. W..... | 339.2 |
| Northfield, Minn., thence Milwaukee R. R..... | 267.7 |
| Farmington, Minn., thence Milwaukee R. R..... | 267.7 |
| Faribault, Minn., thence Milwaukee R. R..... | 268.6 |
| Owatonna, Minn., thence Milwaukee R. R..... | 268.0 |
| Albert Lea, Minn, thence Milwaukee R. R..... | 285.9 |
| Nora Springs Jct., Ia., thence Milwaukee R. R.. | 305.0 |
| Mason City, Ia., thence Milwaukee R. R..... | 309.0 |
| *La Salle, Ill., thence Illinois Central*..... | *563.1* |
| *Peoria, Ill., thence Illinois Central*..... | *721.3* |

Likewise, the North Western line will not permit rates from local points on its line in northwestern Wisconsin to Dubuque to apply via its direct route to St. Paul or to a junction with the C. B. & Q., thence directly down the Mississippi River to Dubuque. Such rates apply only via the North Western line via Chicago junctions, to Clinton, Iowa, thence northward on the C. B. & Q. to Dubuque, thus insuring the longest possible haul for the North Western road.

* Quoted in Footnote to Part 2 of this Appendix, page 22.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

Office-Supreme Court, U. S.
FILED
SEP 17 1951
CHARLES ELMORE CROPLEY
CLERK

**No. 263**

ARMOUR AND COMPANY, SWIFT AND COMPANY, THE CUDAHY PACKING COMPANY, JOHN MORRELL & COMPANY, AND WILSON & CO., INC.,
*Plaintiffs-Petitioners,*

*vs.*

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
*Defendants-Respondents.*

---

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
*Plaintiffs-Respondents,*

*vs.*

ARMOUR AND COMPANY, SWIFT AND COMPANY, THE CUDAHY PACKING COMPANY AND SUPERIOR PACKING COMPANY,
*Defendants-Petitioners.*

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## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

---

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September 14, 1951.

THE DARTNELL-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

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**No. 263.**

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ARMOUR AND COMPANY, SWIFT AND COMPANY, THE CUDAHY PACKING COMPANY, JOHN MORRELL & COMPANY, AND WILSON & CO., INC.,
*Plaintiffs-Petitioners,*

*vs.*

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
*Defendants-Respondents.*

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CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
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*vs.*

ARMOUR AND COMPANY, SWIFT AND COMPANY, THE CUDAHY PACKING COMPANY AND SUPERIOR PACKING COMPANY,
*Defendants-Petitioners.*

---

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

---

MAY IT PLEASE THE COURT:

This brief is filed on behalf of the sixteen carrier respondents,* appellees in the Court of Appeals. Since the

* The Alton Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Chicago, Rock Island

printed record in this Court does not contain a reproduction of a large number of original exhibits which were retained as a part of the record in the Court of Appeals pursuant to stipulation of the parties (R. 285-7) and certified to this Court (R. 341), and since it is necessary for respondents to direct this Court's attention to portions of some of those exhibits, reference is hereinafter made thereto by name and number.

## OPINION BELOW.

The opinion of the Court of Appeals (R. 325-36) is reported at 188 F. 2d 603, *Armour & Co.* v. *Chicago, M. St. P. & Pac. R. Co.*

## JURISDICTIONAL BASIS.

Respondents agree with petitioners that this Court has jurisdiction to review the judgment below under 28 U. S. C. A. Sec. 1254. This case, however, does not, as stated by petitioners (Petition 7), present any question of interpretation of the Interstate Commerce Act, but merely involves questions of construction of certain freight tariffs.

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and Pacific Railroad Company, Chicago, St. Paul, Minneapolis and Omaha Railway Company, Great Northern Railway Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, Guy A. Thompson, as Trustee of Missouri Pacific Railroad Company, Northern Pacific Railway Company, Union Pacific Railroad Company, and Wabash Railroad Company. (R. 270-1.)

## QUESTIONS PRESENTED.

The ultimate questions presented are as follows:

1. Whether, as used with reference to rates in certain tariff rules involved in this case, the words "named" and "published" mean specifically named or specifically published rates, as held by the Court of Appeals, or whether, as claimed by respondents, they meant rates established in any manner?

2. Whether the rule that preference should be given to a construction of a tariff which will not result in unauthorized departures from the long-and-short-haul clause of the Interstate Commerce Act applies to tariffs whose meaning is clear and which expressly stated that the departures appearing therein were authorized by the Interstate Commerce Commission?

3. Whether an intermediate-point rule in a tariff can be invoked to extend the application of the rates named therein to an unnamed point beyond the territorial limitations stated on the title page of the tariff and in the rate-naming item itself?

4. Whether any of the foregoing questions is of sufficient importance to justify consideration thereof by this Court?

## STATEMENT OF THE CASE.

These are, for the most part, actions brought by petitioners against respondent railroads claiming freight-rate overcharges on numerous carloads of fresh meats shipped from western packing plants to eastern destinations between May 1, 1939, and July 1, 1941. There are also involved a few undercharge suits brought by some of the respondents against certain of the petitioners relating to shipments during the same period. The arguments of petitioners in support of their overcharge claims and in defense of the undercharge actions rest on tariff contentions that neither the District Court nor the Court of Appeals could be persuaded to accept. Petitioners now seek review by this Court, asserting that the Court of Appeals has struck down "one of the keystones of the national freight rate structure," and that "chaos and confusion" are about to overwhelm the commerce of the nation. (Petition 4.)

Respondents submit that the decision below presents no cause for alarm—and this observation is not an attempt at levity. No amount of dramatic characterization can make these cases anything but a rather narrow dispute over the meaning and application of certain freight tariff language. Nor is there any occasion for this Court to review this mass of freight claims. The Court below decided the cases correctly; and even if it had erred in any respect, which it did not, no substantial and important federal question could possibly be presented. A brief outline of the character of claim involved will show that no justification exists for granting the requested writ.

Fresh meats move from packing plants on the Missouri River and from other western origins to the East on rates that have, for the most part, been fixed by the Interstate Commerce Commission. A full review of this rate structure would show that petitioners' contentions are wholly incompatible with several fundamental bases of the rate adjustment. Such a review would consume more space than can be spared here; but the history of the rates and the significance of the various rate interrelations were considered at length by the District Court, and that Court made the following important finding of fact:

> "A review of decisions of the Interstate Commerce Commission shows that the rates on fresh meats from western and midwestern origins to eastern destinations follow a very definite pattern, and are part of a delicately balanced adjustment prescribed or approved by the Commission. The shippers' claims are based upon interpretations of the tariffs which would retroactively disrupt that rate adjustment." (R. 202, fdg. 18.)

The through rates on fresh meats from the West to the East are, in general, combinations of separately established rates. On a shipment from Kansas City, Kans., to New York City, for example, the western rate factor covers the movement from origin to the Mississippi River, and the eastern factor covers the movement from the Mississippi River to destination.* In devising the rather intricate rate structure on this commodity the Commission undertook to provide that the through combinations between the various origins and destinations should equalize via all

* The cases were tried, in large part, on a stipulation of facts which, among other things, selected certain shipments as illustrative of the claims presented. One of the typical shipments was from Kansas City to New York City. (R. 289-320.)

gateways and routes, with the result that the western factor is the same regardless of which of the western railroads transports the shipment or via which Mississippi River crossing it moves. (R. 202; Carriers' Exs. 4-7.) During the time involved in these cases, as the Court below found, the applicable through rate from Kansas City to New York was $1.21 per 100 pounds, made up of a western factor of 30 cents and an eastern factor of 91 cents. (R. 327, 333-4.) These were the rates specifically published, respectively, in the western and eastern lines' tariffs. Petitioners seek to reduce this through rate to $1.13.

As the opinion of the Court below shows, the argument by which this rate cut is sought to be accomplished is somewhat involved when traced step by step through the tariffs, but geographically it amounts simply to contending that the western factor, published specifically from Kansas City to the Mississippi River, may be applied over a route from Kansas City to a Mississippi River crossing via Chicago, Ill., thus making Chicago an intermediate point for rate application purposes. Naturally the eastbound rate from Chicago to New York is lower than from the Mississippi River crossings to New York (in these cases 8 cents lower); so that if the through rate could be made by a combination that used the western factor all the way to Chicago rather than only to a Mississippi River crossing, the total transportation charge could be reduced by the difference in the eastern factors. Another of the claims attempts to draw the Kansas City-Chicago rate eastwardly to Kokomo, Ind., in constructing a combination that would defeat the normally applicable rate on certain shipments by 3½ cents. Still another claim, originally pressed with considerable force, was that the rate from Louisville, Ky., to New York City could be drawn back westwardly for about 275 miles and applied from East St. Louis, Ill., as an intermediate origin point. The District Court rejected this last claim

along with the rest, and petitioners abandoned it on appeal to the Court of Appeals.* (R. 205, 259-60, 293-7, 312.)

Petitioners' claim that intermediacy of the foregoing sort reduced the normally applicable rates on the shipments involved rests upon an important and much-used tariff rule known as the intermediate-point rule. The Court below did not, however, misunderstand or misapply that rule, as petitioners assert. The Commission wrote the intermediate-point rule, and prescribed its use as a convenient device for providing thousands of rates to and from thousands of small stations, thus enabling the carriers to satisfy Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6(1)) without the tremendous burden of specifically publishing a multitude of individual rates that would have little commercial use. The rule also serves the important function of avoiding violations of the long-and-short-haul provision of Section 4. (49 U. S. C. A. Sec. 4(1).) When incorporated in any tariff, the rule in essence provides that if an instance is found in which no rate is named to a given station, but that station is intermediate on a route to a point to which a rate is published, the rate applicable to such intermediate station is the rate published to the point beyond. (R. 328, note 3.)

There is no real issue here concerning the purpose and meaning of the intermediate rule. The Court below merely held that certain other tariff provisions upon which petitioners necessarily relied to support their use of the rule did not have the meaning which petitioners sought to read into them. No important national issue is involved in that decision; and it is also correct.

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*As originally filed, the 230 overcharge suits, which were consolidated into one action by the District Court, covered the period from May 1, 1939 to August 31, 1948. (R. 198.) On appeal, petitioners eliminated all claims on shipments which moved after July 1, 1941, all claims based on shipments that originated at East St. Louis, Ill., and certain claims with respect to other shipments prior to July 1, 1941. (R. 259-60.)

That the Court below committed no error in finding the legally applicable rates in these cases to be what the tariffs specifically showed and what respondents claimed is proven, as we shall briefly explain, by an analysis of the particular provisions of the tariffs in question. It is also demonstrated by one of the most persuasive of all forms of evidence—the contemporaneous practical construction of the Commission, which fixed most of the basic rates, and of the petitioners, which, as large and important members of the meat-packing industry, used the rates in countless routine daily transactions, and in formal proceedings before the Commission repeatedly stated their understanding that the applicable rates under consideration were precisely what the Court of Appeals and the District Court found them to be.

## ARGUMENT.

### I.

### THE COURT OF APPEALS DID NOT OVERRULE ANY DECISION OF THE INTERSTATE COMMERCE COMMISSION WITH RESPECT TO THE INTERMEDIATE-POINT RULE.

The contention of petitioners (Petition 3, 9-13, 23-4) that the decision of the Court of Appeals overruled a long line of decisions of the Commission concerning the intermediate-point rule rests upon an inaccurate analysis of the Court's opinion with respect to the rate applicable from Kansas City to Chicago on the shipment designated as No. 2 in the stipulation of facts, and agreed upon as illustrative.

The governing tariff, Tariff 1-X, named in Section 2 a specific rate of 40 cents from Kansas City to Chicago, and in Section 1 a 30-cent rate from Kansas City to various Mississippi River crossings, including East Dubuque, Ill. Section 1 named no rate to Chicago but contained an intermediate-point rule. The precise question presented was whether, by reason of the so-called priority rules governing the several sections of the tariff, the applicable rate from Kansas City to Chicago was the 30-cent rate constructed in Section 1 under the intermediate-point rule or the 40-cent rate specifically published in Section 2. (R. 327-8, 333-4.)

The pertinent rule of construction, which has never been in dispute, is "that a specific rate always takes precedence over a rate made by the use of an intermediate rule * * * unless there are published tariff provisions necessary to make clear, and give effect to, a purpose to have rates resulting from the intermediate rule apply to the exclusion of

rules, are synonymous with "established." When analyzed, this suggestion amounts to a claim that a 30-cent rate was "established" in Section 1 from Kansas City to Chicago within the meaning of the priority rules, but that no rate was "established" in that section from Kansas City to Chicago within the meaning of the intermediate rule. If "established" be substituted for "published" and "named" in both the priority and intermediate rules, the priority rules would give preference to rates "established" in Section 1; but there would *not* be any such rate in Section 1 from Kansas City to Chicago to which preference could be given. In order to find a rate "established" in Section 1, petitioners are forced to invoke the intermediate rule. But when "established" is substituted for "published" and "named" in that rule, petitioners' contention collapses; for the rule, so reworded, could *not* be used to construct a rate from Kansas City to Chicago because it would then provide that it could be so used *only* if Chicago was a "point of destination to which a commodity rate * * * is *not established*" in Section 1. (R. 328, note 3; emphasis supplied.)

The argument advanced by the petitioners to escape the specifically named rate from Kansas City to Chicago in Section 2 is thus one of expedient inconsistency. In order to claim the benefit of the priority rules, petitioners say that a rate was "established" in Section 1; but in the same breath, in order to invoke the intermediate rule in Section 1, they are forced to say that there was no rate "established" in that section. The Court of Appeals properly refused to adopt a construction of tariff language that yields so obviously to the needs of the moment.

Petitioners contend that the words "named," "published," "specified," "fixed" and "established" all have the same meaning, citing *United States* v. *Miller*, 223 U. S. 599. (Petition 16.) That case is not in point here. It

presented the question whether an indictment against a shipper for soliciting a rebate must allege that the tariff containing the rates had been posted in the carrier's depot as required by the Interstate Commerce Act; and this Court properly held that failure to post or keep posted a tariff on file with the Commission could not have the legal effect of freeing a shipper from liability for soliciting a rebate from the rates provided in the tariff. Obviously, it was of no concern in such a situation whether the rates were specifically named, or whether they were provided for by a formula such as the intermediate rule. The question here is not whether a rate had legal existence within the meaning of the Interstate Commerce Act or the Elkins Act. The question is whether the rate which petitioners must construct by use of the intermediate rule is a specifically named rate within the meaning of the particular tariff language here involved. The facts and the law clearly support the decision of the Court of Appeals rejecting petitioners' contentions on this issue.

## II.

### THE COURT OF APPEALS DID NOT CONSTRUE THE TARIFFS INVOLVED IN SUCH MANNER AS TO CREATE VIOLATIONS OF THE INTERSTATE COMMERCE ACT.

On the authority of *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U. S. 686, petitioners argue (Petition 6, 13-14) that the construction placed by the Court of Appeals upon the pertinent language of the western carriers' tariffs would result in violations of the long-and-short-haul clause in Section 4 of the Interstate Commerce Act. (49 U. S. C. A. Sec. 4(1).) Eight alleged violations are cited (Petition 27) as illustrations, none of which affects rates here involved.

Section 4 of the Act does not, as petitioners would seem to argue, contain an absolute prohibition against rates

that are higher for shorter than for longer distances over the same route. Instead, Section 4 prohibits such rates unless they are "authorized by the Commission."

All that was held in the *Delmar* case is that where two constructions of a tariff are possible, one of which would result in an unauthorized Fourth Section departure, preference must be given to that which does not result in a violation of the statute. Since petitioners' construction is not a reasonably possible one, the *Delmar* case is not pertinent. In rejecting an argument similar to that here advanced, the Commission said in *Swift & Co.* v. *Alton R. Co.*, 263 I. C. C. 245, 252:

> "The principle in the case last cited [*Delmar* case] cannot be used to nullify or to change specific tariff provisions."

There is no evidence that the Fourth Section departures cited by petitioners were not authorized by the Commission. On the other hand, all of the western carriers' tariffs here involved specifically stated that they contained rates that were higher for shorter than longer distances over the same route, and gave reference to orders of the Commission granting authority to maintain such rates.* In these circumstances, it must be presumed that the carriers had authority from the Commission for all Fourth Section departures found in the tariffs.

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*A typical statement is found in Item 55 of Tariff 1-X, as follows:

> "Fourth Section Departures. This tariff contains rates that are higher for shorter than longer distances over the same route. Such departure from the terms of the Amended Fourth Section of the Interstate Commerce Act is permitted by authority of Interstate Commerce Commission Fourth Section Order or Orders, as indicated in individual items, and by authority of Fourth Section Orders Nos. 13000 and 13001 of October 19, 1937, and 13050 of March 8, 1938." (Shippers' Ex. 12, p. 6.)

Similar items are found in the other tariffs. (Tariff 1-Y, Item 55, Shippers' Ex. 16, p. 8; Tariff 5-R, Item 131, Joint Ex. 11, p. 21.)

The case of *American Ry. Express Co.* v. *Lindenburg*, 260 U. S. 584, is directly in point. One of the questions there presented was whether the express carrier had been authorized by the Commission to establish rates dependent upon the declared or agreed value of the property transported. The carrier had filed a tariff with the Commission naming rates of that character, and had given reference in the tariff to an order of the Commission. At page 589 the Court said:

> "If these facts do not warrant the logical inference of a grant of authority [by the Commission], they do afford the basis for a legal presumption to that effect, for, if petitioner [carrier] was not duly authorized by the Commission, its action in attempting to limit its liability was unlawful, * * *."
>
> "In the absence of proof to the contrary, we, therefore, indulge the presumption that in basing its transportation charges upon the values recited in the receipt, the petitioner had due authority."

In *Swift & Co.* v. *Alton R. Co.*, 262 I. C. C. 783, it was urged by shippers that the defendant carriers' construction of a particular tariff rule would result in Fourth Section departures; but the Commission said at page 792:

> "But that argument overlooks the fact that in instances where such departures occur * * * the carriers generally have obtained appropriate relief from section 4(1)."

Since there is no evidence to show that the carriers participating in the tariffs here involved did not have authority from the Commission for the Fourth Section departures contained therein, petitioners' reliance upon the *Delmar* case is without foundation.

## III.

**THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF THE INTERSTATE COMMERCE COMMISSION RELATING TO THE EFFECT TO BE GIVEN TO THE TITLE PAGE OF A TARIFF.**

There is no merit to the claim (Petition 4-5, 17-19, 27-9) that in determining the rate applicable to Shipment No. 2-A the Court of Appeals nullified the ruling of the Commission in *Armour & Co.* v. *C. B. & Q. R. Co.*, 215 I. C. C. 537, with respect to the effect of the territorial description on the title page of a tariff upon the construction of the rules contained in the body of the tariff. Shipment No. 2-A moved from Kansas City to New York, and was governed by Tariff 1-Y. Section 2 of this tariff contained a specifically published rate from Kansas City to Hammond, Ind., a point in the Chicago Switching District. Petitioners sought to use this rate as the western factor of the through combination, and claimed that it could be applied at Kokomo, Ind., a point 75 miles east of Hammond, under the intermediate rule.* (R. 312; Shippers' Ex. 16, p. 14, Item 5510.)

Petitioners' argument is based upon three false premises, namely: (1) that the territorial description on the title page of Tariff 1-Y was general and non-restrictive, (2) that the tariff contained a specifically published rate from Kansas City to Kokomo, and (3) that the Court of Appeals by mere inference, drawn from the fact that Kokomo was outside the territorial description found on

* The suggestion of petitioners (Petition 15-16) that the Court of Appeals was inconsistent in its rulings on Shipments Nos. 2 and 2-A is without merit. Different questions of tariff construction were presented. The tariff governing Shipment 2-A contained no rates from Kansas City to any of the Mississippi River crossings which could possibly be applied at Chicago under the intermediate rule, and thus did not present any question of priority as between a specifically published rate and an intermediate-rule rate.

the title page of the tariff, nullified the specifically published rate to Kokomo.

The territorial coverage stated on the title page of the tariff is set forth in the opinion of the Court of Appeals. (R. 336.) The only Indiana points covered were "points in * * * Indiana * * * taking Group Rate Bases Nos. 1 to 8, inclusive (or arbitraries higher), under Column 1 of W. T. L. Territorial Directory No. 1-C."* These were points in the Chicago Switching District such as Hammond, all of which are in the extreme northwesterly corner of the state, and points on the line of the New York Central which runs along the western border of Indiana from the Chicago Switching District to Danville, Ill. (R. 335, note 8; Joint Ex. 13, *e. g.*, pp. 381-2, 385-6.) Tariff 1-Y must therefore be read as fixing the eastern boundary of the territory covered thereby at the specifically defined line along the western border of Indiana. Kokomo is approximately 75 miles east of that line. (R. 335, note 8.)

The controlling principle is that quoted by the Court of Appeals from *Procter & Gamble Distributing Co.* v. *B. & O. R. Co.*, 174 I. C. C. 350, 351, "that a tariff must be construed in its entirety, considering both the limitations on its title-page and the rules contained therein." (R. 336.) In that case it was held that an intermediate rule cannot be used to extend the territorial scope of a tariff in instances where the territorial limitations are clearly defined on the title page or in the body of the tariff.

The *Procter & Gamble* case was not overruled in *Armour & Co.* v. *C. B. & Q. R. Co.*, 215 I. C. C. 537. This is clear from the discussion of these cases by the Court of

*It is well settled that where one tariff makes reference to another tariff, the matter so referred to is thereby incorporated in and made a part of the tariff making the reference. *Lammert Furniture Co.* v. *S. Ry. Co.*, 126 I. C. C. 197, 198; *Pyott Sand & Gravel Co.* v. *A. T. & S. F. Ry. Co.*, 148 I. C. C. 636, 639.

Appeals. (R. 335-6.) As the Court pointed out, the tariff provisions involved in the *Armour* case limited only inferentially and by general language of the title page the applicability of the intermediate rule, whereas here the limitation is specific and unequivocal not only on the title page but also in the item naming the rate. (R. 335, note 8.) Moreover, as an examination of the *Armour* case will plainly show, the points there claimed to be intermediate were actually located geographically *within* the territorial scope of the tariff. In the present case the claimed intermediate point, Kokomo, is 75 miles *beyond* the explicit territorial limits of the tariff.

## IV.

### THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE PRACTICAL CONSTRUCTION OF THE TARIFFS.

The Court below found no uncertainty in the tariff language under review, and the foregoing discussion has briefly shown that conclusion to be sound. But petitioners' cause would not be helped even if an issue of ambiguity could be raised because the practical construction which the Commission and petitioners placed on the tariff provisions in question destroys all basis for the present claims. This Court has recognized that the rule of practical construction is applicable to any written instrument, whether it be a contract (*Topliff* v. *Topliff*, 122 U. S. 121, 131), a statute (*Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, 417-8), or the Constitution of the United States (*McPherson* v. *Blacker*, 146 U. S. 1, 27). The Interstate Commerce Commission has recognized the force of practical construction as applied to tariffs. In *Swift & Co.* v. *Alton R. Co.*, 263 I. C. C. 245, the Commission rejected a contention urged by the shipper that was op-

posed to the consistent, day-to-day interpretation and application which had been given to the involved tariffs by all concerned. The Commission said at page 253:

> "The facts that heretofore shippers, including complainant, the railroads, and this Commission have uniformly construed the tariffs as the carriers have applied them on this traffic; that the existing rate relations have been fixed based upon that construction; and the further important fact that complainant was not misled to its damage by the intermediate rule, properly may be, and they have been, considered in determining the issue here presented."

The record shows beyond question a practical construction of the tariffs consistent with the rates assessed by respondents and paid by petitioners, and in accord with the construction placed upon the disputed provisions by both of the Courts below. That evidence will be summarized here in the briefest possible form.

**(a) Practical Construction by the Commission.**

The Commission, in at least five decisions, has recognized as proper the rates on fresh meats assessed by respondents on shipments involved in these cases.

In *Swift & Co.* v. *N. Y. C. R. Co.*, 220 I. C. C. 171, decided in 1937, the Commission dismissed complaints attacking the rates on fresh meats from St. Paul, Minn., and Missouri River origins to eastern destinations, finding (220 I. C. C. at 188) that the applicable rates on fresh meats to New York were $1.06½ from St. Paul, and $1.15 from Missouri River cities such as Kansas City, Omaha and Sioux City. (Carriers' Ex. 6.) In *Fresh Meats from Iowa and Minnesota to the East*, 227 I. C. C. 765, an outgrowth of the foregoing case decided the following year, the Commission repeated its finding as to the applicable

rates. (227 I. C. C. at 789; Carriers' Ex. 7.) When subjected to general percentage rate increases authorized by the Commission shortly prior to the beginning of the period here involved, the foregoing rates became $1.12 and $1.21, respectively (R. 316), which are the rates collected by respondents and found by the Courts below to be applicable on the shipments under consideration.

In *Swift & Co.* v. *Alton R. Co.*, 262 I. C. C. 783, the Commission dismissed complaints in which four of the present petitioners—Swift, Armour, Cudahy and Wilson—attempted to defeat the rate of $1.21 from the Missouri River to New York which the carriers had there assessed, and which is the rate found applicable by the Courts below on Shipments Nos. 2, 3, 4 and 2-A. (Carriers' Ex. 8.) In *Swift & Co.* v. *B. & O. R. Co.*, 268 I. C. C. 85, the Commission dismissed complaints in which Swift, Cudahy and Armour contended that the applicable rates on fresh meats from St. Paul to eastern destinations were lower than those assessed by the carriers, such rates having been assessed on the same basis as the rates here found applicable by the lower courts. (Carriers' Ex. 11.) In *Superior Packing Co.* v. *B. & O. R. Co.*, 276 I. C. C. 1, the Commission dismissed a complaint in which Superior (one of the petitioners here) challenged as inapplicable the rates assessed by the carriers on fresh meats from St. Paul to eastern destinations. The Commission expressly found that the applicable rate from St. Paul to New York during the period involved was $1.12, which is precisely the rate claimed applicable by respondents and found to be applicable by the Courts below on Shipment No. 5. (Carriers' Ex. 12.) In the first and third of the foregoing cases the shipments moved during the period involved here, and in the second of the cases shortly after. All three cases were decided by the

Commission while the present actions were pending in the District Court, and involved intermediate-rule contentions similar to those here advanced by petitioners.

**(b) Practical Construction by Petitioners.**

By various acts, both informal and formal, petitioners have adopted and expressed a practical construction of the tariffs under review that cannot be reconciled with the claims urged in these cases. The routine business practices of petitioners, relative to this controversy, were covered by the stipulation of facts upon which these cases were tried (R. 290, 315-16), and were summarized by the District Court in the following significant finding:

> "Both before and after the filing of these suits, the shippers voluntarily paid, without protest, the rates claimed applicable by the carriers. The freight charges on most of the shipments were prepaid at the several points of origin. Three of the shippers—Swift, Cudahy and Morrell—prepared the bills of lading covering all of their shipments and inserted therein the rates paid and here claimed applicable by the carriers. The other shippers did not insert any rates in the bills of lading covering their shipments; but the rates paid by Armour on shipments from South Omaha, Nebraska, were those shown as applicable in rate statements which it furnished the carriers' joint agent at that point." (R. 198-9, fdg. 9.)

The every day business construction of the tariffs evidenced by the foregoing finding is in complete accord with public representations made by petitioners from time to time while many of the present claims were pending in the District Court. On this point the District Court made the following finding:

> "During the period of the pendency of these suits, Armour, Cudahy, Swift and Wilson made numerous

representations to the Interstate Commerce Commission, by testimony, exhibits, petitions and briefs, that the rates on fresh meats from a number of points of origin to various points of destination involved in this consolidated cause were the rates assessed, and here claimed applicable, by the carriers on shipments involved in this case." (R. 199, fdg. 10.)

An illustration of the representations referred to by the Court in the foregoing finding is a petition for reconsideration that Armour filed with the Commission shortly before the trial of the present case in the District Court. After reviewing the several decisions of the Commission dealing with rates on fresh meats, the petition stated by way of summary:

"A minor rate change, not necessary to describe here, occurred in 1935. By reason thereof, the rate [to New York City] became, and until July 1, 1946, remained: From Sioux City • • • 1.21; Omaha • • • 1.21; Kansas City • • • 1.21." (Carriers' Ex. 14, p. 24.)

The foregoing statement and several others of the same purport (Carriers' Exs. 13, 14, 15, 16, 19 and 21) were made by responsible shippers to the agency having primary jurisdiction of the subject matter, and reflected a construction of the tariffs under consideration fully in accord with the decision below and thoroughly inconsistent with petitioners' present claims.

## Conclusion.

In denying petitioners' claims, the Court of Appeals merely applied well settled principles of construction to the particular tariff language in controversy. No ground warranting review by this Court has been presented.

Respectfully submitted,

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